Editor's note: 93 I.D. 179

HARNEY ROCK AND PAVING CO.

IBLA 84-896 Decided April 14, 1986

Appeal from a decision of the Burns, Oregon, District Office, Bureau of Land Management, holding appellant liable for trespass damages. O 4-246

Set aside and remanded.

1. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads--Trespass: Generally

   Removal of rock for commercial purposes from land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

2. Trespass: Measure of Damages

   Departmental regulation 43 CFR 9239.0-8 provides that the measure of damages for an unintentional trespass is determined by the laws of the state in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

3. Trespass: Measure of Damages

   Consistent with Oregon law, damages for an unintentional mineral trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing it and crushing it.

APPEARANCES: William D. Cramer, Esq., Burns, Oregon, for appellant; Eugene A. Briggs, Esq., Office of the Regional Solicitor, Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Harney Rock and Paving Company (Harney) has appealed from a letter decision of the District Manager, Burns, Oregon, District Office, Bureau of Land Management (BLM), dated August 1, 1984. The BLM decision found appellant had removed, without authorization, between July 21, 1983, and August 1, 1984, crushed aggregate mineral materials from stockpiles owned by the United States on land patented under the Stock-Raising Homestead Act of 1916 (SRHA), 43 U.S.C. § 291 (1970) (repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787). BLM determined appellant had engaged in a nonwillful trespass and held appellant liable for $ 2,196 in damages, the estimated delivered value of the crushed aggregate, after deducting transportation costs.

BLM records indicate that prior to July 21, 1983, Harney excavated and crushed approximately 10,000 cubic yards of aggregate rock from land patented under SRHA, and stockpiled the material on the tract. The tract, SRHA patent No. 1069161, lies in the SW 1/4, S 1/2 SE 1/4, NE 1/4 SE 1/4, T. 23 S., R. 30 E., Willamette Meridian.

On July 25, 1983, BLM informed representatives of Harney the material stockpiled on this tract still belonged to the United States. To support

this opinion, BLM provided Harney with a copy of the Supreme Court decision in Watt v. Western Nuclear, Inc., 462 U.S. 37 (1983). Shortly afterward, Harney began to remove material from the stockpiles on this tract in order to fulfill a preexisting railroad crossing construction contract with the United States Forest Service.

[1] Section 9 of SRHA, 43 U.S.C. § 299 (1970), provides in part for "[a] reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same." This section also provides for bonding and compensation for damage to the surface owner. In Western Nuclear, the Court interpreted the minerals reservation in SRHA to include substances such as gravel which can be removed from the soil for commercial purposes. 462 U.S. at 53, 55. The Court found no reason to suppose Congress intended such material to be included in the patented surface estate. Like appellant here, Western Nuclear had acquired SRHA patented land to extract materials for commercial road and construction projects. We find the Western Nuclear decision to have controlling effect in this case and hold that the aggregate removed here, like the gravel in Western Nuclear, was reserved to the United States, and was not conveyed along with the surface estate when the land was patented. Although the Court in Western Nuclear was dealing with a gravel deposit rather than a rock quarry, which the instant appeal apparently involves, the Western Nuclear decision is clearly dispositive of this issue. For example, in Pacific Power & Light Co., 45 IBLA 127 (1980), aff'd, Pacific Power & Light Co. v. Watt, No. C 80-073K (D. Wyo. June 17, 1983), the Board similarly held the removal of scoria to constitute a trespass.

Departmental regulation 43 CFR 9239.0-7 establishes procedures for dealing with unauthorized removal of materials from Federal lands and provides:

> The extraction, severance, injury, or removal of timber or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.

An application of the Western Nuclear decision leads to the conclusion the United States owns this resource. Appellant's unauthorized disposal of the crushed aggregate was therefore a trespass. While Harney has not conceded this point, the commercial removal of the material from the SRHA tract is not denied. Indeed, Harney admits in its statement of reasons the removal of 366 yards of crushed stone material from its stockpile located three-tenths of a mile from the gravel pit where the material originated. However, appellant denies any trespass, contending the material was mined, processed, transported, and stockpiled before July 21, 1983, and, therefore, no trespass occurred as that term was defined by BLM Instruction Memorandum No. 84-183.

BLM responds to Harney's argument by explaining that the rock was crushed and stockpiled on a portion of the same SRHA-patented land from which it was extracted. BLM argues the Federal Government has always owned the material and did not waive its right to damages by declining to pursue mineral extractors who were active before the Western Nuclear decision was handed down by the Supreme Court. It is argued that excavation of the

material owned by the United States was therefore a trespass whenever it occurred, and that Harney had actual notice of this fact, but chose to disregard it when it removed the stockpile in 1983. Both BLM and Harney argue each party was willing to negotiate a settlement of this dispute but the other side was unwilling to do so.

The BLM Instruction Memorandum to which appellant refers does not purport to establish a limitation on liability for trespass; to do so would be contrary to the precedent established by Western Nuclear, which affirmed a determination of damages for a trespass which occurred in 1975. The Instruction Memorandum rather acts as a guideline for the exercise of prosecutorial discretion not to collect damages. Thus, the fact the material may have been excavated prior to July 21, 1983, does not absolve appellant of liability. It was not an abuse of prosecutorial discretion to cite appellant for the trespass involved in this appeal. Pursuant, however, to the policy stated in the Instruction Memorandum, BLM did not assess damages for appellant's removal prior to July 21, 1983, of 10,000 cubic yards of rock, despite appellant's liability for such damages under Western Nuclear.

The BLM Instruction Memorandum relied upon by appellant does not excuse acts of trespass occurring prior to July 21, 1983. A change to the memorandum dated January 25, 1984, provides this explanation:

> The instructions in the fourth paragraph of Instruction Memorandum 84-183 imply that the Bureau should only seek damages for mineral materials removed 6 years prior to the date of notice. This is not the case. In all trespasses, the Bureau should attempt to collect the total amount of materials severed

> and the notice of trespass should reflect that total. However, the Bureau should be aware that where the amount of damages are in dispute, the trespasser may be liable for only those damages accruing within the statute of limitation period. There may also be situations where the statute of limitations period may not apply, making the trespasser liable for damages incurred outside of the normal statute of limitations period.

Instruction Memorandum No. 84-183, Change 1 (Jan. 25, 1984). It should be noted also that these agency memoranda are binding only upon employees of BLM, and are in the nature of an operating brochure for use by the Bureau. They do not have the force and effect of regulations, see United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982), and lack authority to confer upon appellant a vested right to relief from liability for damages resulting from its trespass.

Harney raises several other arguments, none of which provide a basis for relieving appellant of liability for the trespass. Harney contends removal of its name from a list of contractors eligible to contract with the Government already has cost more than the amount assessed as damages for trespass. Appellant points out it has paid county and local property taxes on the stockpiled materials, that the material was taken to satisfy a Government contract bid before July 21, 1983, and that appellant is a small local contractor unable to absorb the loss of money expended in stockpiling this material. None of those arguments, however, are relevant to deciding whether a trespass occurred or to the amount of damages. However, Harney correctly objects to the method by which BLM appraised the value of the material removed by Harney. BLM determined the unit value of the crushed aggregate in the stockpile was $ 6 per yard, based on the actual quantities

used, the payment specified in the Harney-Forest service contract, and deductions for transportation from the stockpile to the construction site. Harney argues also the value of the stockpiled material is not the same as its value in place, i.e., in the pit, so that when the cost of crushing, hauling, and stockpiling is subtracted, the value of the rock taken is $ 36.60, not $ 2,196.

[2] Departmental regulation 43 CFR 9239.0-8 makes the following provision for the determination of damages in a trespass case such as this:

> The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of Mason et al. v. United States (260 U.S. 545, 67 L. ed. 396), will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.

See United States v. Marin Rock & Asphalt Co., 296 F. Supp. 1213 (C.D. Cal. 1969). Apparently, BLM determined there was no Oregon rule to apply in this case since the BLM decision on appeal cited 43 CFR 9239.5-1, which provides that the measure for an ores trespass in a state where there is no state law governing such a trespass would be the same measure as in the case of a coal trespass. Under this regulation, BLM is required to identify the measure for a coal trespass under Oregon law, and if there is none, apply 43 CFR 9239.5-3(a). Subsection (1) of that regulation provides that payment must be made for the value in place before severance.

BLM did not apply this rule correctly. The value of rock in place is not its value in appellant's stockpile but its value in the ground, prior to severance from the ground. See Knife River Coal Mining Co., 70 I.D. 16 (1963). Furthermore, BLM's citation to a regulation which applies only when there is no state law defining the measure of damages means that BLM overlooked a decision by the Supreme Court of Oregon, Holliday v. Dunn & Baker, Inc., 125 Or. 144, 265 P. 1096 (1928), which held, concerning damages for unintentional removal of rock from a quarry: "[W]e think the true measure to be not the value of the rock as it was ready for placing on the road, but that value less the expense of preparing it for the road." Id. at 1097. The court further stated: "The true measure of damages was the rock in the quarry severed and crushed, less the expense of severing and crushing it." Id. Thus, appellant's argument as to the proper method of determining damages is consistent with Oregon law. However, the Oregon court observed that the plaintiff at trial "did not seek by his questions to employ that standard," id., and because of this deficiency in evidence, the court affirmed a jury award of damages which corresponded more closely to the royalty value of the mineral, a smaller amount than would have been awarded had the plaintiff submitted proof which corresponded to the appropriate test. The Holliday court faulted the plaintiff for failure to frame the questions to a witness so as to get at the true measure of damages.

> The royalty standard for computing damages is not widely favored. One authority opines:
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> > The royalty method has been criticized on the ground that royalty is a matter of contract, not of damages for a tort, and an owner

> of minerals who is in a position to do so should not be deprived of the right to mine his own minerals and reap the profits himself, by a rule of damages which grants him, in the case of innocent trespass, an award of royalties merely, and thereby, in effect, compels him to execute a retroactive lease to the trespasser.

54 Am. Jur. 2d Mines and Minerals § 253 (1971).

In Knife River Coal Mining Co., supra, the Department rejected the use of the royalty standard for computing damages if state law did not require its use. In that case, BLM determined the trespass had been innocent, and stated that the trespass payment must be made for the value of the coal in place before severance. The Government demanded $ 272,305.94, which it calculated by determining the average selling price of coal and subtracting the actual mining expenses directly related to the coal extraction process. The appellant in that case, however, contended the damages only amounted to $ 32,650.60, or $ .10 a ton for the coal mined, the royalty rate which the Government would have been paid had the deposits been under lease. The Department rejected appellant's arguments for the following reasons:

> The cases cited by the appellant involving mineral trespass are from other jurisdictions which appear to have adopted the rule that the measure of damages for innocent trespass in removing minerals from the land of another not himself engaged in mining is the usual and customary royalty. These cases do not help the appellant. It has not pointed to any North Dakota cases wherein any such "royalty" rule has been applied. Thus the appellant has failed to show that the North Dakota statute sets forth a different rule for the measure of damages for an innocent coal trespass from the rule applied by the State Supervisor. Consequently, the rule prescribed in 43 CFR 288.6 is applicable.
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> It is, of course, completely unrealistic to say that the detriment suffered by the United States is to be measured by its

> loss of royalty alone. To accept damages on such a basis would be to completely disregard the detriment suffered by the Government in having its coal deposits, which it administers under the terms of the Mineral Leasing Act (30 U.S.C., 1958 ed., Supp. III, sec. 181 et seq.), for the good of the Nation, taken from it without regard to whether it deems it administratively desirable to dispose of them at any particular time, without regard to whether the taking of coal from this 80-acre tract would permit the most economical mining of the coal, without regard to the advantage to be gained from the selection of a qualified lessee to mine the coal, and without regard to the loss of the bonus which would have been received through competitive bidding for the property (30 U.S.C., 1958 ed., Supp. III, sec. 201). In addition to the above, such a settlement would place a trespasser in a preferred status and would penalize those who complied with the law. For example, the trespasser is not bound by the coal mining operating and safety regulations of the Department (30 CFR, Part 211) as is the lessee.
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> In the circumstances of this case and in view of the fact that the state of the North Dakota law is such that it cannot be said with certainly that the State has prescribed any measure of damages for coal trespass different from that applied in this case, it must be held that the demand made upon the appellant was proper.

Id. at 18. In Western Nuclear Inc., supra, and Pacific Power & Light Co., supra, however, we affirmed a determination of damages based on the royalty method. In Pacific Power & Light, we indicated concern about BLM's use of this measure, noting we were not aware of any provision of Wyoming law which limited damages only to the royalty value of the material removed, and where no State law so limits compensation for damages, the measure of damages may be somewhat higher than the royalty rate of the material removed. Id. at 140 n.5, citing Knife River Coal Mining Co., supra. The Knife River and Pacific Power & Light cases indicate BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said "with certainty" that state law requires a different method. See Knife River, supra at 18.

One point which must be made is that in the Knife River case, the royalty rate would have given the United States a lower compensation than a computation based upon the value of the minerals extracted less the cost of extraction. However, there may be circumstances in which the extraction costs are so large that recovering a reasonable royalty rate would ensure the United States a larger recovery. In light of appellant's allegations concerning the cost of mining, this appeal might be such a case. To apply a royalty standard for calculating damages which would more generously compensate the United States is not inconsistent with the result in the Holliday case. A similar issue was considered by a court in determining damages owed to the United States for a sand and gravel trespass under California law:

> If a reasonable royalty rate is a correct measure of damages for good faith trespass of this type under California law, how then can one reconcile with such a measure of damages the result in Whittaker v. Otto, [248 C.A. 2d 666, 56 Cal. Rptr. 836 (1967)] in which the plaintiff was allowed to recover the value of the minerals extracted less the cost of extraction? The answer to this question is provided in National Lead Co. v. Magnet Cove Barium Corp., 231 F. Supp. 208 (W.D. Ark. 1964). In that opinion, which involves a good faith trespasser who extracted minerals, the court concludes that the plaintiff may elect between two different damage formulae, i.e. a royalty rate or the value of the extracted minerals less costs of production. The court goes on to analyze the purpose and advantages of the two formulae. As the court says on page 217:
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> > There are two general measures of damage for trespass to minerals which are described as the "mild" and the "harsh" rules. The "mild" rule applies where the trespass is inadvertent, innocent or not in bad faith, and fixes the damages as the value of the minerals in situ. The so-called "harsh" rule, applied when the trespass is wilful, intentional, or in bad faith, allows the injured party the enhanced value of the product at the time of conversion.
> >
> > Within the framework of the mild measure, there are two different guidelines to determine the

> in-place value of ore: first, the royalty value whereby the injured party is allowed as damages an amount equivalent to the value of the privilege of mining and removing the minerals; second, another application of the mild rule allows the injured party to recover the value of the minerals after extraction less a credit to the trespasser of its production costs. The effect of allowing the royalty method as damages is not to punish the nonwilful trespasser, but to compensate the injured party for being deprived of the possibility of extracting the minerals. Alternatively, allowing the injured party to recover the enhanced value of the converted minerals with a deduction in favor of the trespasser for the cost of mining them will also compensate for being deprived of the right of mining the minerals and developing them, while preventing the trespasser from profiting from his wrongdoing. When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached. [Emphasis added.]
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> * * * The royalty formula obviously is a simpler one to apply. It does not involve the parties or the court in any complicated accounting. It provides damages to the aggrieved party even where the trespasser's operations have proved unprofitable. The other formula, as stated in the above quotation from National Lead, prevents the trespasser from profiting from his wrongdoing and requires him to account to the aggrieved party for all of his net profits. Surely fairness would dictate that the Plaintiff in this type of a case have such an election of remedies and I hold that such an election exists under California law. In the instant case the government has elected to claim under the royalty formula.

United States v. Marin Rock & Asphalt Co., supra at 1219.

[3] Accordingly, we hold that absent a clear expression to the contrary in the law of Oregon, damages for an unintentional trespass involving crushed rock may consist of either (1) the royalty value of the mineral or (2) the market value of the severed and crushed rock less the expenses of severing and crushing it, whichever is greater.

Because BLM did not calculate the damages to be paid by appellant in accordance with either method, this case must be remanded for BLM to do so.

In this appeal, BLM overlooked the Holliday case, a controlling state court decision. In Pacific Power & Light Co., supra at 140 n.5, this Board criticized BLM's failure to cite state law in support of its determination of damages. In United States v. Marin Rock & Asphalt Co., supra at 1216, the court observed that "neither counsel has really understood that California state law governs the damage question and neither has done an adequate job of briefing the California law on the subject." It is because this error is frequent, and is apparently easy to fall into, that this opinion has discussed the matter in detail.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Burns District Office is set aside and the case remanded for further action consistent with this opinion.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge